IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for mandates in the nature of Writ of Certiorari, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A (Writ) Application
No.342/2012

Balasooriya Mudiyanselage Soorathunga Balasooriya

No.460/1, Temple Road,

Bingiriya.

PETITIONER

-Vs-

1. Saman Piyasiri,

   Branch Manager,

   People's Bank,

   Bingiriya.

2. Chandrika,

   Regional Manager,

   People's Bank,

   Regional Office,

   No.03, Wathhimi Road,

   Kurunegala.

3. Chief Manager,

   Depart of Recoveries,

   People's Bank Head Office,

Sir Chiththappalam A. Gardiner Mawatha,

Colombo 02.

4. **Deputy General Manager (Recoveries),**

   People's Bank Head Office,

   Sir Chiththampalam A. Gardiner Mawatha,

   Colombo 02.

5. **Senior Manager (Recoveries),**

   Recoveries Department,

   People's Bank Head Office,

   Sir Chiththampalam A. Gardiner Mawatha,

   Colombo 02.

6. **W. Karunajeewa,**

   Former Chairman,

   People's Bank Head Office,

   Sir Chiththampalam A. Gardiner Mawatha,

   Colombo 02.

6A. **Gamini Senarath,**

   Chairman,

   People's Bank Head Office,

   Sir Chiththampalam A. Gardiner Mawatha,

   Colombo 02.

7. **The People's Bank,**

   Sir Chiththampalam A. Gardiner Mawatha,

   Colombo 02.

8. W.M.I. Gallella,

Public Auctioneer and Court Commissioner,

No.28, New lawyer's Complex,

Kumarathunga Mawatha,

Kurunegala.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Asthika Devendra with Lilan Warusawithana and Sunali Jayasuriya Wasantha for the Petitioner

Kushan de Alwis PC with Kaushalya Navaratne for 1st to 7th Respondents

Decided on : 29.04.2019

A.H.M.D. Nawaz, J.

This application for judicial review raises the question whether a resolution adopted by a bank, prior to the enactment of *Recovery of Loans by Banks (Special Provisions) (Amendment) Act, No 1 of 2011*, could be acted upon to conduct a *parate* execution and recover outstanding dues from a borrower, even when the principal amount borrowed is less than Rs 5 million. Does the bank act *ultra vires* in acting upon a pre-amendment resolution and proceeding to auction? Is the *Recovery of Loans by Banks (Special Provisions) (Amendment) Act, No 1 of 2011* retrospective so as to nullify the pre-amendment resolution? These are the questions that arise in these proceedings.

The learned counsel for the Petitioner Mr Asthika Devendra has strongly contended that the Amendment Act, No 1 of 2011 is retrospective and this retrospectivity is manifest upon a perusal of the speech made by the relevant

Minister who introduced the bill on 06th January 2011. The Hansard of Parliamentary proceedings on 06th January 2011 figured prominently in the argument for retrospectivity Mr Devendra put forward. A recourse to extrinsic aid to statutory interpretation is consequent upon this argument and the learned counsel relied on the seminal case of ***Pepper (Inspector of Taxes) v Hart*** (1993) AC 593; (1992) 3 WLR 1032 which holds that Parliamentary material is a permissible aid to statutory interpretation. Interestingly, the spirit of ***Pepper v Hart*** lives on in many a jurisdiction and in 2010, a nine-judge bench of the Supreme Court of the United Kingdom cited ***Pepper*** as an authoritative pronouncement of Parliamentary privilege-see ***R v Chayton*** (2010) UKSC 52.

Long before the advent of this case, our courts acknowledged the relevance of Hansards in judicial proceedings and Samarakoon CJ in ***J.B. Textiles Industries Ltd v Minister of Finance and Planning (1981) 1 Sri.LR 156*** alluded to the admissibility of statements made in Parliament as evidence in a case. Be that as it may, I shall return to this argument and echoes of ***Pepper v Hart*** in Sri Lanka later in this judgment and let me now deal with the crux of the issues.

The Petitioner seeks in the main to quash the resolution of 17th June 2003 that finally led to the sale of the mortgaged properties in 2012. The resolution relied upon by the bank is evidently a pre-amendment step taken under Sections 3 and 4 of the principal amendment namely *Recovery of Loans by Banks (Special Provisions) Act, No 4 of 1990.* By the Amendment Act, No 1 of 2011 which was certified on 28th January, 2011, Section 5A was brought in to give relief to borrowers who had obtained a loan of less than Rs 5 million. The Amendment Act, No 1 of 2011 was further amended by Amendment Act, No 19 of 2011 on 31st March 2011 to clarify that the Amendment would operate only in respect of borrowings where the principal amount borrowed is less than Rs 5 million.

Section 5A as amended by Act No 19 of 2011, which comes up for interpretation on the question whether it is retrospective in its effect, goes as follows:

5A (1)

> *"No action shall be initiated in terms of section 3 of the principal enactment for the recovery of any loan in respect of which default is made, nor shall any steps be taken in terms of section 4 or section 5 of the aforesaid Act, where the principal amount borrowed of such loan is less than rupees five million....."*

So as of 28.01.2011 when the *Recovery of Loans by Banks (Special Provisions) (Amendment) Act, No. 1 of 2011* was certified, 3 types of action or steps are prohibited on the part of banks in respect of a loan when the principal amount borrowed is less than Rs.5 million.

1. Section 3 action
2. Section 4 step
3. Section 5 step

All these three actions or steps that are authorized by the principal enactment namely *Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990* are embargoed by the Amending Act No. 1 of 2011 as amended.

So what was prohibited by the Amendment Acts in 2011, when the principal amount borrowed is less than Rs. 5 million, have to be reemphasized.

1. Section 3 of the principal enactment Act No. 4 of 1990 enables the board of a bank to treat a borrower as if in default of the entirety of the unpaid portion of the loan in the event he has defaulted in the payment of any sum, whether on account of the principal or interest.

2. This deeming provision to treat the borrower as a defaulter enables the bank to initiate, in its discretion, action either in terms of section 4 or section 5.

3. Section4 of the principal enactment empowers the board of a bank to adopt a resolution to authorize any person to sell by auction any property mortgaged to the bank, which is the security for the loan.

4. The board may, in terms of Section 5 of Act No. 4 of 1990, authorize any person by resolution to enter upon the mortgaged property, take possession and manage it.

From the effective date of the Amendment Act No 1 of 2011 namely 28th January 2011, none of the above steps could be taken by any bank in respect of the specific class of borrowers i.e those who have borrowed less than Rs 5 million.

The intendment of the legislature is quite clear and unambiguous upon a scrutiny of the above provisions and the pith and substance of the Amendment read with the principal enactment is that no resolution to sell by *parate execution* a mortgaged property can be adopted by a bank, after 28th January, 2011, in respect of a borrower whose principal amount borrowed is less than Rs 5 million. So the *Recovery of Loans by Banks (Special Provisions) (Amendment) Act, No 1 of 2011*, as amended by Act No 19 of 2011, confers an advantage on these class of borrowers in that there will be no more board room resolutions to effect *parate* executions of their mortgaged properties but it will be open to the creditor bank to institute hypothecary action in respect of these loans less than Rs 5 million.

The watershed date is 28th January, 2011, after which there must be, *in esse*, a borrower whose borrowing must be less than Rs 5 million. The date of the loan is immaterial. It can be before or after 28th January 2011. The consequence is that the bank is incompetent to adopt a resolution in terms of section 3, 4 or 5 of the principal enactment.

The gravamen of the argument of the learned Counsel for the Petitioner was that since the Petitioner's loan was Rs 2 million, he falls within section 5A (1) and no resolution can be passed against him.

But the nub of the problem in this case is distinctive. The resolution to sell by auction the mortgaged property had long been adopted by the People's Bank as far back as 17th June 2003-almost 8 years before the Amendment Act No 1 of 2011 came into effect. The Amendment Act prohibits the passage or adoption of a resolution only after 28th January 2011. The Amendment is only offensive of a prospective resolution. It cannot possibly claw back at a resolution adopted as far back as 17th June 2003.

Bearing this in mind, Mr.Asthika Devendra quite ingeniously argued that the Amendment Act bears a retrospective effect because it was enacted in order to help the small time borrowers. Section 5A is broad enough to nullify the prior resolution and as such the resolution dated 17th June 2003 must be quashed by *certiorari*. This was the argument of the learned Counsel for the Petitioner.

Before I answer this question presently, I find upon the chronology of events surrounding the loan transaction that the resolution dated 17th June 2003 was frustrated a number of times by acts undertaken by the Petitioner. I will not go into detail as regards the factual background of the case but suffice it to say that the Petitioner was granted two loans by the People's Bank and the mortgaged properties operated both as primary and secondary mortgages for these two loans. Two lands which constitute the security were offered by the Petitioner to the bank as a security for an initial loan of Rs 2 million and later the Petitioner executed a secondary mortgage of these two lands for an overdraft facility of Rs 1 million on 30.06.1999. There was also a primary mortgage of another land which the Petitioner offered as a security for the overdraft. Though the Bank adopted a resolution upon default, this was not proceeded with as the Petitioner sought the indulgence of the bank to pay and

settle the dues. As the Petitioner did not honour his undertaking, it would appear that the bank was compelled to adopt another resolution on 17.06.2003- **X21 and X21A.**

This is the resolution that is sought to be quashed in these proceedings by way of a writ of certiorari. I find a number of letters from the Petitioner which acknowledge liability on his part. Though an auction had been fixed, it would appear that it was cancelled because of a solemn undertaking on the part of the Petitioner to make payment. The letter marked as X29 bears this out. Since no meaningful steps were taken by the Petitioner to make the payment, an auction came along for 5.04.2005. But just 4 days before the auction, the Petitioner went before the District Court of *Kuliyapitiya* and obtained an interim order against the conduct of the auction. The matter had proceeded in the District Court for three years until the action was dismissed on 12.03.2008 eventuating in the dissolution of the interim injunction.

Having made several representations to various institutions other than the bank, the Petitioner eventually settled the outstanding amount on the overdraft facility that had been granted. In other words the secondary mortgage bond was discharged and the deed of release is found at **X43**. The security taken for the overdraft was thus released.

But this left the loan facility of Rs 2 million unsettled and the primary mortgage bond was yet alive for the bank to realise its outstanding dues on this loan. **X21** and **X21A**-the Sinhala and English versions of the resolution of 17th June 2003 clearly identify the two loans separately and a sum of Rs 1.8 million was due on the original loan of Rs 2 million together with interest at 26 per cent from 12.11.1998 onwards. Thereafter steps were taken in due compliance with the law to effect *parate* execution and by **X47** dated 10.10.2012, the Bank gives its reasons as to why it was proceeding to an auction. Before the auction was held, the Amendment Act No 01 of 2011 was passed but the auction proceeded to a

fruition and one finds a certificate of sale (**X58** dated 20.12.2012) by which the Bank purchased the property at the auction and became its owner. No doubt the Bank enjoys a vested right of resale of the properties provided it has acted properly in accordance with the law.

It is in this factual background that the Petitioner has raised the quintessential question before this Court namely whether the Amendment Act No 01 of 2011 applies to the facts and circumstances of this case. Does section 5A of Amendment Act No 01 of 2011 disable a resolution adopted prior to its passage? Is the Amendment Act retrospective? Could the bank have acted upon the resolution of 17th June 2003?

The learned President's Counsel Mr Kushan de Alwis for the Respondent Bank chose to demonstrate that the Amendment Act No 01 of 2011 was not retrospective at all. He strenuously contended that there is nothing in the Act that manifests an intention to prohibit and nullify the effect of a previous resolution. Section 5A on the face of it does not eventuate in a retrospective effect. The learned President's Counsel cited a judgment of Anil Gooneratne J in ***S.K.Rahuman Maulana v People's Bank*** (2004) Volume 1 Hulftsdorp Law Journal 510 wherein the learned Judge took the view in the Court of Appeal that the Amendment Act No 01 of 2011 does not have a retrospective effect.

As I set out the ambit of section 5A before, the prohibition is only against passing a resolution after 28th January 2011, when the principal amount borrowed is less than Rs 5 million. Ex facie, there is no prohibition against prior resolutions that have been adopted.

The crux of the Amendment Act No 1 of 2011 as amended by Amendment Act No 19 of 2011 is that no bank can pass a resolution with a view to holding an auction when the principal amount is less than Rs 5 million. The Amendment Act only nullifies a post-Amendment resolution that comes after 28th January 2011 and it leaves intact a resolution that was adopted prior to 28th January

2011. This is the view I take after having carefully examined the Amendments vis a vis the principal enactment.

If a resolution had been adopted prior to 28th January 2011, it is quite clear that the Amendment Act No 1 of 2011 as amended would not apply. Section 5A (1) of the Amendment Act would not prohibit the holding of an auction and sale of the mortgaged property if the auction emanates from a resolution that was adopted before the Amendment Act came into effect on 28th January 2011.

One has to give effect to the clear words of a statute and as Lord Diplock said in ***Duport Steel v Sirs*** (1980) 1 WLR 142:

> *"Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse to give effect to its plain meaning because they consider the consequences of doing so would be inexpedient, or even unjust or immoral."*

Mr. Asthika Devendra's argument that the resolution of June 2003 flies in the air as Section 5A has to be given retrospective effect would also fail by the canons of interpretation surrounding the presumption against retrospectivity. It is axiomatic that as the legislature of a state is sovereign in its sphere of legislative competency, the Sri Lankan legislature in the exercise of its authority enjoys the competence to enact legislation with retrospective effect- see Article 75 of the Constitution which enacts that " Parliament shall have the power to make laws including laws having retrospective effect and repealing or amending any provision of the Constitution.....".

But this competence is subject to its guiding principles recognized by well known cases and commentators.

N.S. Bindra's Interpretation of Statutes (12th Edition.., 2017, p 508-509) states the principle as follows:-

"When the law is altered during the pendency of an action, the rights of the parties are decided according to the law, as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.....

Where the rights and procedure are dealt with together, the intention of the legislature may well be that old rights are to be determined by the old procedure, and that, only the new rights under the substituted section are to be dealt with by the new procedure. If the procedural alteration is closely and inextricably linked with the changes simultaneously introduced in another part of the statute dealing with substantive rights and liabilities, it is not possible to give retrospective operation to the amendment regarding procedure unless the legislature has indicated such an intention either by express words or by necessary implication...

So the legislature must manifest retrospectivity on the face of the statute and as the learned President's Counsel for the Respondent Bank correctly submitted, the Amendment Act does not display such intention.

Maxwell on Interpretation of Statutes at page 215, 218 and 220 (12th Edition), states as follows:-

Page 215

"Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless the retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

Page 218 -

*"The rule under discussion has been applied chiefly, in cases in which the statute in question, if it operated retrospectively, **would prejudicially affect vested rights** or the legality of passed transactions or would impair contacts or would impose new disabilities in respect of past transactions....."*

Page 220 -

"In general, when the substantive law is altered during the pendency of an action, the rights of parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such a right."

Thus Maxwell makes it clear that legislature is loath to remove vested rights and if retrospectivity results in an eventuality of vested rights being taken away, one cannot hold that the presumption against retrospectivity has been rebutted. By way of the resolution adopted as far back as 17th June 2003, the People's Bank acquired a vested right to take further steps in order to effect *parate* execution. There was no defeasance of this vested right by the Amendment Acts enacted in 2011. Since legislature is slow to remove vested rights, retrospectivity cannot thus be presumed.

In this regard, the attention of the Court was drawn to page 64 of **Craies on Statute Law 7th Edition Universal Law Publishing** where it is stated as follows:-

"Strictly speaking there is no place for interpretation or construction except where the words of statute admit two meanings. As Scott LJ said: Where the words of an Act of Parliament are clear, there is not room for applying any of the principles of interpretation which are merely presumptions in cased of ambiguity in the statute.....

The cardinal rule for the construction of an Act of Parliament is that they should be construed according to the intention expressed in the Act themselves.

If the words of a statute are themselves precise ....., then no more can be necessary than to expound those words in their ordinary and natural steps.....

The Tribunal has to construe an Act of a Legislature, or indeed any other document has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view. In 1953 Lord Goddard CJ, said, "A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered."

Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statutes speak the intention of the legislature."

So the retrospectivity argument would come a cropper but the learned Counsel for the Petitioner invited this Court to presume retrospectivity by way of the principles adumbrated in ***Pepper v Hart*** (supra). The invitation was to infer retrospectivity having regard to the speech made by the Minister when he presented the Amendment Bill. In fact both Counsel read out to Court some of the excerpts from the speech of the Minister who moved the Bill in Parliament.

In 1992 the House of Lords delivered what some commentators call a blockbuster in the case of ***Pepper v Hart*** (supra). By a six to one majority (Lord Mackay LC dissenting) the House of Lords decided to allow reference to be made to Hansard in limited circumstances. Reference to Parliamentary materials would be allowed where:

(a) legislation is ambiguous or obscure, or leads to absurdity;

(b) the material relied upon consists of one or more statements by Minister or of the promoter of the Bill, together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect:

(c) the statements relied upon are clear.

In this case, the effect of permitting reference to Hansard was that the literal meaning of the statute in question was not followed.

Some comments by their Lordships are worth noting here. Lords Bridge stated (at 1039H, WLR) that:

> *It should, in my opinion, only in rare cases where the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and where the promoter of the legislation has a clear statement and directed to that very issue, that reference to Hansard should be permitted.*

Lord Oliver commented (1042H, WLR)

> *It can apply only where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity.*

Lord Mackay (dissenting) observed:

> *I believe that practically every question of statutory construction that comes before the courts will involve an argument.....[on (a) to confirm the meaning of a provision as conveyed by the text, its object and purpose; (b) to determine a meaning where the provision is ambiguous or obscure; or (c) to determine the meaning where the ordinary meaning is manifestly absurd or unreasonable]....it follows that the parties' legal advisors will require to study Hansard in practically every such case to see whether or not there is any help to be gained from it. I believe this is an objection of real substance. It is a practical objection not one of principle....*(1037G, WLR).
>
> *Such an approach appears to me to involve the possibility at least of an immense increase in the cost of litigation in which statutory construction is involved. (1038B, WLR).*

Lord Bridge further commented on the issue of additional costs (1039H, WLR).

> *Provided the relaxation of the previous exclusionary rule is so limited, I find it difficult to suppose that the additional cost of litigation or any other of the ground of objection can justify the court continuing to wear blinkers which, in such a case as this, conceal the vital clue to the intended meaning of an enactment....[W]here Hansard does provide the answer, it should be so clear to both parties that they will avoid the cost of litigation.*

There has since been rise and fall of ***Pepper v Hart***-see some useful comments such as J.Steyn; "*Pepper v Hart:* A Re-examination" (2001) 21 Oxford Journal of Legal Studies, 59; S.Vogenauer, "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn", (2005) 25 Oxford Journal of Legal Studies, 629-74. For specific references to ***Pepper v Hart*** in Sri Lanka see the cases of ***De Silva v Jeyaraj Fernandopulle and Others*** (1996) 1 Sri.LR 70; ***Hettiaarachchi v Seneviratne, Deputy Bribery Commissioner and Others (No 2)*** (1994) 3 Sri.LR 293. For references to Hansards being made for purposes of statutory interpretation also see in addition to ***J.B.Textiles*** (supra)-***Gunasekera and Others v Ravi Karunanayake*** (2006) 3 Sri.LR 16; ***Shiyam v Officer-in-Charge, Narcotics Bureau and Another*** (2006) 2 Sri.LR 156. Thus it is clear that our courts have indeed alluded to statements made in Hansards and it has to be acknowledged that the relaxation of the exclusionary rule against Hansards was recognised in this country long before it was set down in England.

Elizabeth Laing writing in (2006) Judicial Review 44 reiterates the applicability of the grounds as I set out above at (a), (b) and (c), if Hansard speeches were to be brought into a case for interpretation-see *Pepper v Hart*: **Where Are We, How Did We Get Here, and Where Are We Going ?** (2006) JR 44 at 46. If the legislation is unambiguous or clear, there is no warrant for the applicability of parliamentary material to statutory

construction. I have taken the view that the statutory language manifest in the Amendment Act is so plain as the pikestaff that recourse to Parliamentary speech made by the mover of the Bill becomes otiose. I have *though* carefully gone through the speech of the relevant minister at pages 488, 489 and 490 of the Hansard dated 16th January 2011 and I do not find any clear statement made by the Minister on the issue for interpretation before this Court. In the circumstances I hold that there is no warrant to infer retrospectivity having regard to the facts and circumstances of this case.

So I would hold that the Respondent Bank lawfully acted on a resolution of 17th June 2003 in order to carry out its *parate* powers. The Amendment Act No 1 of 2011 as amended does not have a retrospective effect so extensive enough to invalidate the prior resolution.

In view of this holding it is not necessary for me to consider the other discretionary bars such as *laches* that the learned President's Counsel for the Respondent bank raised in regard to this application. Accordingly I would refuse the remedies prayed for by the Petitioner and proceed to dismiss the application for judicial review.

JUDGE OF THE COURT OF APPEAL.